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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/620,038	07/15/2003	Justin Shimck	6126US	7511
30173 7590 01/12/2009 GENERAL MILLS, INC. P.O. BOX 1113 MINNEAPOLIS, MN 55440				
EXAMINER				
BEKKER, KELLY JO				
ART UNIT		PAPER NUMBER		
1794				
MAIL DATE		DELIVERY MODE		
01/12/2009		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/620,038

**Applicant(s)**

SHIMEK ET AL.

**Examiner**

Kelly Bekker

**Art Unit**

1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 23 October 2008.  
2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.  
3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1, 3-27, 29-39 and 81 is/are pending in the application.  
4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.  
5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.  
6) ☒ Claim(s) 1, 3-27, 29-39 and 81 is/are rejected.  
7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.  
8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.  
10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).  
11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)  
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)  
3) ☐ Information Disclosure Statement(s) (PTO/SB-08)  
Paper No(s)/Mail Date \_\_\_\_\_  
4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_  
5) ☐ Notice of Informal Patent Application  
6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION**

Amendments made 10/23/08 have been entered.  
Claims 1, 3-27, 29-39, and 81 remain pending.

***Claim Rejections - 35 USC § 112***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

The 112 2<sup>nd</sup> paragraph rejections of claims 30 and 31 as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention has been withdrawn in light of applicant's amendments made 10/23/08.

***Claim Rejections - 35 USC § 102***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1, 3-9, 14, 15, 32, 38, and 81 are rejected under 35 U.S.C. 102(e) as anticipated by Roy et al (US 2004/0109933). The references and rejection are incorporated herein and as cited in the office action mailed January 14, 2008.

***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 10-13, 19, 20, 22, 24, 27, 29-31, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6309686 B1). The references and rejection are incorporated herein and as cited in the office action mailed January 14, 2008.

Claims 16-18, 21, 23, 25, 26, and 33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6207216 B1). The references and rejection are incorporated herein and as cited in the office action mailed January 14, 2008.

Claims 34 and 35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6207216 B1), further in view of Iggoe (Dictionary of Food Ingredients, 4<sup>th</sup> Edition). The references and rejection are incorporated herein and as cited in the office action mailed January 14, 2008.

Claims 37 and 39 are rejected under 35 U.S.C. 103(a) as being unpatentable over Roy (US 2004/0109933), in view of Zietlow (US 6207216 B1) and Iggoe (Dictionary of Food Ingredients, 4<sup>th</sup> Edition), further in view of Gajewski (US 4251561). The references and rejection are incorporated herein and as cited in the office action mailed January 14, 2008.

### ***Response to Arguments***

Applicant's arguments filed October 23, 2008, regarding the prior art rejections, have been fully considered but they are not persuasive (Remarks page 8).

Applicant argues that the references of record, specifically Roy does not teach of a marbit with the same glass transition temperature and spring back factor as instantly claimed. As stated in the previous office action, Applicant's argument is not convincing as Roy teaches of a similar confectionary composition as instantly claimed, including the claimed softening agent within the instantly claimed range, thus it would be expected that Roy inherently teaches of a product that has the substantially the same properties, including glass transition temperature and spring back factor as the product instantly claimed. Applicant is reminded that where the claimed and prior art products are substantially identical in structure or composition, a prima facie case of either anticipation or obviousness has been established. In re Best, 562 F.2d 1252, 1255, 195 USPQ 430, 433 (CCPA 1977). "When the PTO shows a sound basis for believing that the products of the applicant and the prior art are the same, the applicant has the burden of showing that they are not." In re Spada, 911F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990). Applicant has chosen to use an equation with parameters and/or calculations that cannot be measured by the Office, for the purpose of prior art comparison, because the office is not equipped to manufacture prior art products and compare them for patentability. Therefore, as a prima facie case of obviousness has

been properly established, the burden is shifted to the applicant to show that the prior art product is different.

Applicant's affidavit and arguments concerning (Remarks page 9) the affidavits filed October 23, 2008 have been fully considered but they are not persuasive.

Applicant's arguments and affidavit state that it has been established that there was a reduction to practice of the present invention prior to the prior art date of October 31, 2003 in Roy et al, thus removing Roy et al. as prior art. Applicant's affidavit and arguments are not convincing as the affidavit does not establish possession of whole invention as claimed or something falling within the claim (such as a species of a claimed genus), in the sense that the claim as a whole reads on it (MPEP 715.02). For example, the affidavit shows a marbit that was reduced to practice with a water activity of 0.25 comprising both glycerin and fat, wherein the glycerin, a softening agent, is included at a maximum of 15%; the affidavit does not include a marbit that did not require fat and that comprised 0.05-15% foaming agent, 0.5-20% structuring agent, a moisture content of 1-10%, a water activity of 0.1-0.4, and/or 5-25% of a softening agent as instantly claimed. There is no evidence provided to support that the instantly claimed invention was in fact conceived and reduced to practice prior to the prior art date of October 31, 2003. Thus, as stated above, applicant's affidavit and arguments concerning the affidavit are not convincing as there is no evidence to show conception and reduction to practice of the instantly claimed invention prior to the prior art date of Roy.

### ***Conclusion***

**THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kelly Bekker whose telephone number is (571) 272-2739. The examiner can normally be reached on Monday through Friday 8am-4:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Jennifer McNeil can be reached on (571) 272-1540. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Lien Tran/  
Primary Examiner  
Art Unit 1794

/Kelly Bekker/  
Examiner  
Art Unit 1794